90-554

No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JACK R. THOMAS,

Petitioner,

vs.

THE GARRETT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jack R. Thomas, pro per
2162 E. Yale Drive
Tempe, Arizona 85283
602-831-6556

QUESTIONS PRESENTED

1. Whether an "At Will" clause of employment supercedes First Amendment Right to Petition court for redress without evidence of a knowingly &-intelligent waiver or abandonment of right for redress is present.

2. Whether it is proper to grant a summary judgment to opposing party when there is evidence of perjury brought to light on appeal.

3. Whether it is proper to affirm award of summary judgment when the plaintiff's counsel was not a counsel of record in accordance with the Rules of Civil Procedure.

LIST OF PARTIES

PETITIONER:

JACK R. THOMAS

RESPONDENTS:

THE GARRETT CORPORATION

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II. There are no official reports of the decision below.

III. JURISDICTION

1. The Ninth Circuit Court of Appeals denied petitioner his appeal from a grant of summary judgment for appellee Garrett Corporation by order dated May 31, 1990.

2. A petition for rehearing was not filed and an enlargement of time to petition for certiorari was not sought.

3. The Court has jurisdiction to review this case by writ of certiorari under 18 U.S.C.§ 1254 (1), which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"

IV. CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

....."nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

CONSTITUTIONAL PROVISION INVOLVED CONT.

The Fourteenth Amendment to the Constitution of the United States provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 2 § 5 of Arizona Constitution. Right of petition and of assembly.

"The right of petition, and of the people peaceably to assemble for the common good, shall never be abridged."

Article 2 § 13 of Arizona Constitution. Equal privileges and immunities.

"No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

V. STATEMENT OF THE CASE

The petitioner on or about December 11, 1987 filed in the Superior Court of Arizona, CV 88-01834 a breach of contract suit against the Garrett Corporation. On or about February 18, 1988, the Garrett Corporation removed said case from the Superior Court of Arizona to the United States District Court of Arizona CIV 88-0271 PHX-EHC. On January 4, 1989 an order by the United States District Court was entered granting Summary Judgment for Defendant. Petitioner filed a timely Notice of Appeal and cause was set before the Ninth Circuit Court of Appeals No. 89-15041. Memorandum opinion was filed May 31,

1990 affirming judgment of the district court.

The district court ruled that petitioner failed to establish a genuine issue of material fact in his attempt to show the Garrett's employee handbook had become a part of appellant's employment contract.

The Ninth Circuit reviewed the district court's grant of summary judgment de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989). The Ninth Circuit further focused on the issue where an employer issues a personnel manual that clearly and conspicuously tells employees that the manual is not part of the employment contract and that their jobs are terminable at will, no reasonable expectations of job security are instilled in employees, nor does the manual give employees any reason to rely on representations in the manual.

Citing Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz. 1984).

The handbook of Garrett, included a disclaimer that read:

> "Your employment with Garrett is voluntarily entered into, and you are free to resign at any time. Similarly, Garrett may terminate the employment relationship where it believes it is in the company's best interest. Neither this handbook nor any other communication by a managerial representative is intended in any way to create a contract of permanent employment. However, all members of management are dedicated to ensuring that discipline, including dismissal, is administered in a consistent and equal manner."

The district court interpreted the disclaimer as negating any possibility that the handbook could be construed as modifying

appellant's at will employment contract. The judgment of the district court was therefore AFFIRMED.

A "At Will" clause of employment which is administered in a purely one-sided affect and which is enforced by the Garrett Corporation and all 100,000 employees working for ALLIED SIGNAL AEROSPACE COMPANY is unconstitutional.

This case presents for review a unique and difficult question not previously faced in the FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION decided by this Court.

The First Amendment to the United States Constitution guarantees that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances."

VI ARGUMENT

In interpreting this constitutional guarantee, this Court has held that: "Where rights secured by Constitution are involved, there can be no rule making or legislation which would abrogate them. Miranda v. State of Arizona, 86 S.Ct. 1602, 384 U.S. 436, 16 L.Ed. 2d 694.

In Ex Parte Hull, 312 U.S. 546 (1941), "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeaus corpus." 312 U.S. at 549. Cf. Cochran v. Kansas, 316 U.S. 255, 257 (1942).

It would appear arguendo then, that no corporation can have any policy such as "At Will" employment which would deny and prevent an individual from obtaining a forum in either a state or federal court as a means of filing a grievance as ALLIED SIG-

NAL AEROSPACE COMPANY through the GARRETT CORPORATION.

Reasonable access to the courts is a right secured by the Constitution and Laws of the United States, being guaranteed as against state action by the due process clause of the 14th Amendment. See White v. Ragan, 324 U.S. 760, 762 m.l. and Hatfield v. Bailleaux, 290 f.2d 632, 636 (C.A. 9th Cir. 1961).

The Court said:

> "there is no higher duty than to maintain it unimpaired." Bowen v. Johnston, 306 U.S. 19, 26 (1939).

In conclusion, this record indicates the need for reconsideration as to whether a corporation "At Will" policy nullifies the FIRST AMENDMENT when there is no evidence that "At Will" policy advised employees explicitly of their Constitutional Rights they would be waiving in signing "AT WILL" clauses in employment applications.

With no evidence of a knowingly, and intelligent waiver of a First Amendment Right being evident in any testimony, said corporate policies should be declared unconstitutional and in direct contravention to Article 2 § 5 of the Arizona Constitution.

It should be noted that there is a distinct interpretation of the "AT WILL" aspect of employment contrary to each other before the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals which urges this Court to speak out on.

For example, one highly influential federal case has considered as a factor in determining a handbook's effect on the employee at will relationship, is whether or not there was a showing that the handbook had been written or approved by the president or a vice president of Sears. See, e.g., Reid v. Sears, Roebuck and Co., 790 F.2d 453, 460-461 (6th Cir. 1986). Not in evidence in the instant cause now before this Court.

In the memorandum No. 89-15041 the Ninth Circuit said on page 3 therein:

> "But where an employer issues a personnel manual that clearly and conspicuously tells employees that the manual is not part of the employment contract and that their jobs are terminable at will, no reasonable expections of job security are instilled in employees, nor does the manual give employees any reason to rely on representations in the manual. Citing Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz.1984).

QUESTION # 2 PRESENTED FOR REVIEW

ARGUMENT

VII. In the defendant's "Motion for Summary Judgment", before the United States District Court, page 15 therein they stated:

> ....Because plaintiff did not invoke Garrett's Appeal Procedure, the dispute resolution mechanism preferred by Arizona courts and required by his "contract." Garrett is entitled to summary judgment.

Subsequently in defendant's "Reply in Support of Motion for Summary Judgment" CR 25. District Court, page 9 therein they re-stated:

> "Plaintiff argues in his Response that the Employee Appeal Procedure was not applicable to him because: (1) he was not a regular full-time employee since he had been laid off, and

> (2) the subject of his grievance was not within the scope of the grievance/ arbitration procedure (Response, p. 16). Plaintiff's first argument is contradicted by the terms of the Procedure which specifically stated that it was (emphasis) applicable to employment terminations, such as plaintiff's:
>
> > A formal appeal regarding termination must be submitted within five (5) working days from the date of termination.
>
> (Exhibit "17", p.7.) Moreover, at the time that he was laid off, plaintiff was certainly a "regular full-time employee within the terms of the grievance/arbitration procedure."

In the hearing for "Motion for Summary Judgment" on December 12, 1988 before the Honorable Earl H. Carroll, Judge presiding, cause No. CIV 88-0271 PHX EHC, the defendant stated as a matter of record that:

Page 5 therein, by MR. CLEES:

> ....."that Mr. Thomas failed to avail himself of what is, quite frankly, a sophisticated and procedurally quite fair administrative relief provision in this contract. It is one that's been enforced by other judges."

On three separate occasions the defendant lied to the District Court about a grievance/arbitration procedure, claiming the Plaintiff failed to avail himself of.

On appeal to the Ninth Circuit Court of Appeals, Docket No. 89-15041, plaintiff submitted a "JUDICIAL NOTICE" regarding a letter of grievance plaintiff submitted to the President of Garrett Turbine Engine Co., within five (5) working days after the

plaintiff's lay-off, who in turn sent the grievance letter to Frank Zembick, head of Human Resources and the grievance/arbitration board. That this letter in the hands of Garrett's grievance/arbitration procedure within five (5) days was evidence that plaintiff exhausted and made avail to himself the avenue of appeal within the structure of the company and their grievance/arbitration procedure. This was supported by oath and affirmation of the plaintiff.

The fact that plaintiff had in fact asserted his right to grievance/arbitration was further evidenced by court record in the Deposition of Jack R. Thomas by the defendant page 51 therein where plaintiff stated under oath and made a part of the district court's record by stating:

> A. "Well, I assumed, when I wrote to Mel Craig, that the letter would have gone to the — whatever people he had to review these matters."

This answer was in response to MR. CLEES questioning about the Human Resource Department at Garrett which heads the grievance/arbitration procedure.

The defendant heard this testimony before their "Motion for Summary Judgment and subsequent response and knowledge of plaintiff's effort for grievance/arbitration, and yet informed the district court otherwise.

The defendant's further stated on appeal to the Ninth Circuit Court of Appeals in their "ANSWERING BRIEF FOR APPELLEE", that:

> page 18 therein;
>
> "....Although plaintiff knew that appeal procedures existed, he did not take any action to invoke the procedures as specified and explained in the Handbook at the time of the layoff." (C.R.39, pp.9-10.)

There is no telling how much this repeated lying had in the district court's ruling for summary judgment, or how much it influenced the Ninth Circuit Court of Appeals in affirming.

This was clearly new evidence withheld from the district court which was presented to the Ninth Circuit Court of Appeals. The Ninth Circuit didn't even make reference to this new evidence and "JUDICIAL NOTICE."

Implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The court's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendants' life or liberty may depend. In Napue v. Illinois, (1959), 360 U.S. 264, 3 L.Ed. 2d 1217, 79 S.Ct. 1173; this Court stated:

> ..."it is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. That the district attorney's silence was not the result of guilt or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

The same logic and abhorrence to lies would apply just the same for any attorney who in the course of presentation allows a lie to go uncorrected, and as "officers of the court" the standard of ethics applies the same upon attorney's of record as it does upon district attorneys for the states they represent.

It is established beyond doubt that the prosecution's use or reliance on testimony known to be false is a practice so lacking in fundamental fairness as to deprive an accused of due process of law. See, Napue v. Illinois, supra, see also, Pyle v. Kansas, (1942), 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177; Imbler v. Craven, (1969), 298 F. Supp. 795; Curran v. Delaware, (3rd Cir. 1958), 259 F.2d 707; see also, Mesarosh v. United States, (1956), 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1; Mooney v. Holohan, (1935), 294 U.S. 103, 79 L.Ed. 79, 55 S.Ct. 340.

The Fourteenth Amendment is violated when, although not soliciting false evidence, the State allows it to go uncorrected when it appears. See, Alcorta v. Texas, 355 U.S. 28; United States ex rel. Thompson v. Dye, 221 F.2d 763; United States ex rel. Almeida v. Baldi, 195 F.2d 815; United States ex rel. Montgomery v. Ragen, 86 R. Supp. 382.

The prosecution is charged with the knowledge of its agents including the police. Imbler, 298 F. Supp. at 806. Corporations should in fact be responsible for their agents which are attorneys licensed by the State, and sworn officers of the court to uphold the law.

Because JOE CLEES represents the Garrett Corporation, it was his sworn duty to tell the truth and not to fabricate or lie before the district court and the Ninth Circuit Court of Appeals. His conduct was reprehensible, and clouded the court's viewing of the facts.

"The fundamental requisite of due process of law is the opportunity to be heard." See, Goldberg v. Kelly, 397 U.S. (1969); Grannis v. Ordean, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

It has been established that equal protection of the laws is violated by the withholding of equal access to the courts. See

Traux v. Corrigan,257 U.S. 312 (1921), or by inequality of treatment in the courts, see Neal v. Delaware,103 U.S. 370 (1881). This means that no agency of the State, legislative, executive or judicial, Virginia v. Rives, 100 U.S. 313 (1880); no instrumentality of the State, and no person, officer or agent exerting the power of the State shall deny equal protection to any person within the jurisdiction of the State, The clause prohibits "discriminating and partial legislation in favor of particular persons as against other in like conditions." Minneapolis Railway Co. v. Beckwith, 129 US. 26, 28, 29 (1889).

QUESTION #3 PRESENTED FOR REVIEW

ARGUMENT

This writ of certiorari is not a petition from a disgruntled individual who bares a resentment, but from a concerned citizen of the United States who believes in the privilege of bringing every law to the test of the constitution which belongs to the humblest citizen, who owes no obedience, to any legislative act, which transcends the constitutional limits as does this case which did not take one iota of testimony from the plaintiff in open court and considered the hearing to be fair and impartial by the court.

The rights denied to me, the humblest of citizens, affects the well-being and job interests of 100,000 people employed by the Allied Signal Aerospace Industry which allegedly believes in the theory of continuous improvement but denies the individual of his right to seek redress of grievances under the premise of "At Will" doctrine. They stand accountable to no one.

SEYMOUR GRUBER, Attorney at Law, responded in the District Court for the plaintiff on December 12, 1988, and never filed his formal appearance with the district court as required by the district court Rules of Civil Procedure.

It was this technical fact which the Ninth Circuit Court of Appeals failed to respond to in their memorandum opinion Docket No. 89-15041 which evidenced the denial of plaintiff's Fifth Amendment Rights, his Fourteenth Amendment Rights to the United States Constitution, and plaintiff's rights under the Arizona Constitution, Articles 2 § 5, and Article 2 § 13 therein.

WHEREFORE: petitioner prays for this Honorable Court's intervention of this gross injustice and asks for justice in whatever way this Court deems necessary and proper.

Respectfully submitted

Jack R. Thomas-Petitioner
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Tele. (602) 831-6556

Exhibit 1-1

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK R. THOMAS,	)	No. 89-15041
	)	D.C. No. CV-88-0271-EHC
Plaintiff-Appellant,	)	
	)	
vs.	)	MEMORANDUM*
	)	
	)	
GARRETT CORPORATION, a California corporation, dba Garrett Turbine Company, ALLIED-SIGNAL, INC., Successor in interest to the Garrett Corporation,	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Submitted March 14, 1990**
Pasadena, California

Before: FLETCHER, PREGERSON, and NELSON, Circuit Judges.

Appellant Jack R. Thomas appeals, pro se, a grant of summary

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously found this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

judgment for appellee Garrett Corporation. The district court ruled that Thomas failed to establish a genuine issue of material fact in his attempt to show that Garrett's employee handbook had become a part of appellant's employment contract. Thomas contends that the summary judgment is contrary to Arizona law, which recognizes a cause of action for wrongful termination through breach of an implied contract whose terms are contained in an employee handbook. We reject Thomas's contentions and affirm the district court's grant of summary judgment. We deny the Garrett Corporation's request for sanctions pursuant to Fed. R. App. P. 38.

We review the district court's grant of summary judgment de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989). The question of whether Thomas's complaint states a cause of action is a question of state law, and we must review the district court's interpretation of state law de novo. In re McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984)(en banc). Because we are applying Arizona law to appellant's complaint, we are bound by the Arizona Supreme Court's case law. Olympic Sports Prod., Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 912-13 (9th Cir. 1985), cert. denied sub nom Whitaker Corp. v. Olympic Sports Prod., Inc., 474 U.S. 1060 (1986).

Arizona law recognizes that the at-will effect of an employment agreement may be modified by the conduct and statements of the parties. Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1036 (Ariz. 1985). An employer's policy statements, as expressed for example in an employee handbook, regarding such things as job security and employee disciplinary procedures "may become part of the contract, supplementing the verbalized at-will agreement, and thus limiting the employer's absolute right to discharge an at-will employee." Id. But where an employer issues a personnel manual that clearly and conspicuously tells

employees that the manual is not part of the employment contract and that their jobs are terminable at will, no reasonable expectations of job security are instilled in employees, nor does the manual give employees any reason to rely on representations in the manual. Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz. 1984).

On August 26, 1987, Thomas was laid off by the Garrett Corporation. Thomas contends that his layoff was in violation of the corporation's employee handbook, which stated that layoffs would be made based on seniority within each of its departments.[1] The handbook, however, included a disclaimer that read:

> [y]our employment with Garrett is voluntarily entered into, and you are free to resign at any time. Similarly, Garrett may terminate the employment relationship where it believes it is in the Company's best interest. Neither this handbook nor any other communication by a managerial representative is intended in any way to create a contract of permanent employment. However, all members of management are dedicated to ensuring that discipline, including dismissal, is administered in a consistent and equal manner.

The district court interpreted the disclaimer as negating any possibility that the handbook could be construed as modifying appellant's at will employment contract. The district court's

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[1] The handbook stated that appellee considered a layoff to be the equivalent of a termination, although a laid off employee could be recalled and reinstated with the time spent on layoff added to accrued seniority for up to one year from the date the employee was laid off. Garrett Corporation did recall Thomas on July 26, 1988. Thomas contends, however, that his present position is at a lower grade with fewer benefits.

interpretation is consistent with the Arizona Supreme Court's holding in Leikvold. The judgment of the district court is therefore AFFIRMED. Appellee's request for sanctions is DENIED.

Exhibit 2-1

JUDGMENT ON DECISION BY THE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JACK R. THOMAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV-88-271-PHX-EHC
	)	
THE GARRETT CORPORATION,	)	JUDGMENT
	)	
	)	
Defendant.	)	
	)	

This action came on for hearing before the Court, the Honorable Earl H. Carroll, United States District Judge, presiding and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that defendant's motion for summary judgment having been granted, that plaintiff take nothing and the action is hereby dismissed.

DATED at Phoenix, Arizona this 4th day of January, 1989.

RICHARD H. WEARE, Clerk

By: _____
Deputy Clerk

cc: All Counsel
CIV-20 (5/1/84)

Exhibit 2-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JACK R. THOMAS,	)	
	)	
Plaintiff,	)	
	)	CIV 88 - 271 PHX EHC
v.	)	
	)	
THE GARRETT CORPORATION,	)	ORDER
	)	
	)	
Defendant.	)	
	)	

This is an action for damages resulting from an alleged breach of plaintiff's employment contract by his employer, The Garrett Corporation, associated with the layoff of the plaintiff in August 1987. The action was removed from state court on the basis of diversity. Plaintiff contends that his employment agreement with Garrett included the policies and procedures in the company employee's handbook entitled "Working Together at Garrett" (Handbook). It is alleged that his layoff violated his contractual employment agreement because it was effected in a manner contrary to the stated policies and procedures in the Handbook.

Plaintiff Jack R. Thomas completed and signed an Application for Employment with defendant on July 15, 1985. The Application contained language stating that his employment was terminable by either party at will. Plaintiff was hired in September 1985 for "an indefinite term as a "Materials Assistant," and was assigned to a part of the Fabrication Control Group. Plaintiff's performance reviews rated his job performance as good or very good, and he was promoted to the position of "Materials Handler"

after being employed about five months. On July 1, 1987, plaintiff requested a transfer to another department and completed and signed an accompanying Application for Employment, which contained the same language concerning the terms of his employment as his original application. Prior to any transfer, on August 26, 1987, plaintiff was laid off as part of a company wide work force reduction.*

In order to establish the claim for breach of contract, plaintiff must establish: (1) that the Handbook provisions became a part of the employment contract; and (2) that the terms of the Handbook were breached. Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250, 254 (1986). Defendant filed a motion for summary judgment contending in part: (1) that the employee Handbook was not a part of the employment agreement and did not modify the at-will relationship; and (2) assuming the Handbook was part of the employment agreement and the layoff breached the employment agreement. Plaintiff may not bring this suit because he failed to exhaust the internal appeal and arbitration procedures contained in the Handbook, which would also be a part of any contract based on the Handbook.

I. Terms of the Employment Agreement

The defendant contends that plaintiff was an at-will employee and could be terminated at any time without notice, with or without cause. The general rule in Arizona is that if an employment contract is for an indefinite period of time, it is presumed to be terminable by either party at any time with or without cause. Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); Wagner, 722 P.2d 252. Since it is not disputed that Thomas was hired for an indefinite term, there is a presump-

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* Plaintiff was recalled on July 25, 1988, as a Materials Assistant, at a higher rate of pay than when he was laid off.

tion that Thomas was terminable at any time with or without cause. However, Arizona, like a majority of states, has adopted three exceptions to the general rule, including the implied-in-fact contract exception to protect the legitimate expectations of employees. Wagner, 722 P.2d at 253.

Plaintiff contends that the provisions of the employee Handbook became part of an implied-in-fact contractual employment agreement. In Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 170 (1984), the Arizona Supreme Court held that representations in a personnel manual upon which employees could reasonably rely, can become terms of an employment contract and can limit an employer's ability to discharge employees. In determining whether provisions of a handbook become part of the employment contract, the Court stated:

> Whether any particular personnel manual modifies any particular employment-at-will relationship and becomes a part of the particular employment contract is a question of fact. Evidence relevant to this factual decision includes the language used in the personnel manual as well as the employer's course of conduct and oral representations regarding it.

688 P.2d at 174.

A. Language in the Handbook

In Leikvold, the Court went on to qualify the holding that representations in personnel manuals can become part of employment contracts by stating:

> We do not mean to imply that all personnel manuals will become part of employment contracts. Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells

> their employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason. Such actions, either not issuing a personnel manual or issuing one with clear language of limitation, instill no reasonable expectations of job security and do not give employees any reason to rely on representations in the manual.

688 P.2d at 174.

Garrett contends that the policies in the manual are prefaced with a prominent statement that the provisions are not contractual. The Garrett Handbook under the bold-faced heading "Employment Policies," contains the following disclaimer:

> Your employment at Garrett is voluntarily entered into, and you are free to resign at any time. Similarly, Garrett may terminate the employment relationship where it believes it is in the Company's best interest. Neither this Handbook nor any other communication by a managerial representative is intended in any way to create a contract of permanent employment. However, all members of management are dedicated to ensuring that discipline, including dismissal, is administered in a consistent and equal manner.

Plaintiff admits that the disclaimer is clear in that the handbook does not create a contract of permanent employment, but contends the language is not clear and conspicuous as to whether the policies in the Handbook supplement the at-will relationship.

Although whether the provisions of the Handbook became

part of the contract is a question of fact, where the terms of the agreement are clear and unambiguous, the construction of the contract is a question of law for the court. Leibvold, 688 P.2d at 174. In Bedow v. Valley National Bank, CIV 88-471 PCT RCB (D. Ariz. Oct. 6, 1988), and Chambers v. Valley National Bank, CIV 88-472 PCT RGS (D. Ariz. Sept. 30, 1988), the court held that the following disclaimer in the defendant's personnel manual was clear and conspicuous and did not create an implied-in-fact contract of employment:

> Nothing contained in this handbook should be construed as a guarantee of continued employment, but rather, employment with the bank is on an 'at will' basis.

Similarly, the language of the disclaimer in the Garrett Handbook clearly and unambiguously tells employees in common language that they may resign at any time, and similarly, that they are terminable by Garrett when the Company determines it is in its best interests, and that neither the handbook, or any other communication, is intended to create any contract of permanent employment. The last sentence further states that the company is dedicated to treating employees consistently and fairly in this relationship. It does not indicate any modification of the relationship as described.

Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). Because the disclaimer in the Handbook clearly and conspicuously tells employees that they are terminable at will and that the Handbook does not create a contract of permanent employment, the Handbook does not modify the terms of employ-

ment and it does not instill any reasonable expectations of job security. Therefore, there is no material issue of fact as to whether the handbook became part of the employment agreement, or as to the terms of the agreement. Thus, plaintiff has failed to establish an essential element of his claim and summary judgment is appropriate.

B. Employer's Course of Conduct and Representations

Even assuming that the disclaimer was not clear and conspicuous and the terms of the agreement were not unambiguous, involving an issue of fact, summary judgment is nevertheless appropriate because reasonable minds could not draw different conclusions or inferences from the undisputed facts as to whether plaintiff could have reasonably relied upon the employer's course of conduct and representations in concluding that the provisions in the Handbook became part of his contract of employment. See Wagenseller, 722 P.2d at 1038.

The Leikvold test indicates that in addition to the language, other conduct and representations of the employer are to be considered in determining whether the Handbook became part of the agreement. Plaintiff contends that the Handbook became part of his employment contract, modifying the at-will relationship, because of Garrett's course of conduct in following the procedures in the Handbook in disciplining, suspending, and terminating employees, conducting work appraisals, and enforcing overtime and vacation policies. Further, plaintiff contends that the pictures and comments of the President and Chairman of the Board of Garrett on the first page of the handbook indicate their endorsement of the provisions upon which plaintiff could rely. While these contentions may provide a basis for relying on the provisions of the Handbook as company policy, they do not detract from the language in the disclaimer so as to indicate that the Handbook modified the terms of plaintiff's employment agreement. Plaintiff

has produced no evidence regarding any other conduct or oral or written representations by any superiors at Garrett concerning the terms of his employment agreement upon which plaintiff could have based either reasonable expectations as to his job security or reasonable reliance on the terms of the Handbook as part of his agreement.

However, there is evidence that the plaintiff did not believe that the Handbook modified the terms of his employment and that any reliance was not reasonable under the circumstances. First, the application for employment which plaintiff completed and signed on two occasions, immediately above the place for the applicant's signature, contains the notice "PLEASE READ CAREFULLY." A portion of the text under this notice reads as follows:

> In consideration for my employment, I agree to conform to the rules and regulations of The Garrett Corporation, and my employment and compensation can be terminated with or without cause, and with or without notice at any time at the option of the company or myself. I understand that no representative of The Garrett Corporation other than the President or General Manager of this Division has any authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to the foregoing.

This identical clause is also used by Sears, Roebuck & Company and has been the subject of several wrongful discharge cases in Michigan, which has a rule regarding implied-in-fact contracts similar to that in Arizona, involving claims that the terms of an Employee handbook modified the employment agreement such that dismissal could only be for cause. Every reported district

court case involving claims for wrongful discharge in the face of this language has resulted in summary judgment for Sears. See Reid v. Sears, Roebuck & Company, 790 F.2d 453, 461 (6th Cir. 1986). Although the instant case does not involve a claim that the plaintiff could only be discharged for cause, the decisions hold that such provisions clearly notify employees that they are terminable at will, without cause. In addition, plaintiff Jack Thomas made statements at several places in his deposition that at the time of his employment and layoff he understood that his employment could be terminated at will, and that he did not regard the Handbook as part of his contract.

It is clear, in light of all the evidence presented, that these circumstances do not create a question of fact concerning reasonable reliance for a jury. The test for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The mere existence of a scintilla of evidence in support of plaintiff's position will not be sufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id. at 251-52. Summary judgment is appropriate because based on the test in Leikvold, reasonable minds could not differ under these circumstances as to whether plaintiff could have reasonably relied upon the provisions of the Handbook as part of his employment contract, thereby modifying his employment relationship.

II. Exhaustion of Internal Grievance Procedures

Assuming the Handbook modified the terms of the employment contract, and further that the agreement was breached, summary judgment is still appropriate because plaintiff failed to exhaust the formal and informal grievance procedures set forth in the Handbook, which would also be a part of the modified agreement. The internal procedures are clearly set out in plaintiff's

copy of the Handbook. They involve both formal and informal proceedings. The Handbook states that the Company appeal procedures are available to all regular full time employees, and were applicable in this instance, plaintiff's arguments to the contrary being without merit. Although plaintiff knew that appeal procedures existed, he did not take any action to invoke the procedures as specified and explained in the Handbook at the time of the layoff.

It is a general rule in collective bargaining agreement disputes that employees must exhaust contractual remedies and internal grievance and arbitration procedures before bringing suit. See Payne v. Pennzoil, 138 Ariz. 52, 672 P.2d 1322 (App. 1983); Dutrisac v. Caterpillar Tractor Co. 749 F.2d 1270 (9th 11 Cir. 1983). This principle is also applicable where a plaintiff seeks to assert rights based on provisions of an employee handbook, which also provides grievance procedures.

Accordingly, for the foregoing reasons, it is hereby ORDERED granting defendant's motion for summary judgment. DATED this _____day of January, 1989.

Earl H. Carroll
United States District Judge

Exhibit 3-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK R. THOMAS,	)	
	)	
Plaintiff-Appellant,	)	DOCKET NO. 89-15041
	)	
-vs-	)	
	)	(No. CIV-88-271-PHX-EHC)
THE GARRETT CORPORATION,	)	NOTICE OF APPEAL
	)	
	)	
Defendant-Appellee.	)	
	)	

Comes now the plaintiff-appellant, JACK R. THOMAS, in the above entitled cause who respectfully files a timely "NOTICE OF APPEAL" with intent to seek a writ of certiorari to the United States Supreme Court regarding matters herein.

Respectfully submitted

Jack R. Thomas-Plaintiff
2162 E. Yale Dr.
Tempe, Arizona 85283
Tele. (602) 831-6556

Exhibit 3-2

STATE OF ARIZONA)
)SS
COUNTY OF MARICOPA)

CERTIFICATE OF MAILING

I, JACK R. THOMAS, Being first duly sworn, deposes and says:

That pursuant to the rules of this Court, appropriate copies of the foregoing "NOTICE OF APPEAL" were, on the date first appearing below were mailed to the Clerk of the United States Court of Appeals for the Ninth Circuit for filing, and were mailed to appellee addressed as follows:

MR. JOSEPH T. CLEES
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003

_____
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE
ME THIS _____DAY OF JUNE, 1990

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES _____

Exhibit 3-3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK R. THOMAS,	)	
	)	
Plaintiff-Appellant	)	
	)	
v.	)	
	)	
GARRETT CORPORATION, etc.,	)	No. 89-15041
	)	
	)	CV-88-0271-EHC
Defendant-Appellee	)	
	)	
	)	

APPEAL from the United States District Court for the _____ District of ARIZONA (Phoenix)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of _____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in the Cause be, and hereby is AFFIRMED.

Filed and entered _____